

No. 77-630

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL BERYLLIA CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

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OPINIONS BELOW

The order of the court of appeals (Pet. App. i) is reported at 562 F. 2d 42. The decision and order of the National Labor Relations Board is reported at 222 NLRB 1289 (A. 103-115).¹ The underlying Supplemental Decision and Certification of Representative of the Board's Regional Director (S. Pet. App. 1a-23a) is unreported.²

¹"A." references are to the printed appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

²"S. Pet. App." refers to the Supplemental Appendix to the Petition.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1977. The petition for a writ of certiorari was filed on October 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly rejected petitioner's objections to a representation election without holding a hearing.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are:

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. Pursuant to a representation petition filed by Local 177 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein, "the Union"), the Board conducted an election among petitioner's employees, which the Union won by a vote of 72 to 42 (A. 32).³ Petitioner filed timely objections

³There was one vote for an intervening union and seven challenged ballots (A. 32).

to the election alleging, *inter alia*, that the Union had offered to waive initiation fees only for those who signed with the Union prior to the election, in violation of *National Labor Relations Board v. Savair Mfg. Co.*, 414 U.S. 270 (A. 4, 33).⁴

In support of its "initiation fee waiver" objection, petitioner submitted to the Board's Regional Director affidavits from two employees, Louis Macaluso and Elizabeth Gulino, concerning representations allegedly made by Union Recording Secretary and Organizer Primo Benale concerning the waiver offer. Macaluso's affidavit asserted that Benale "at a mass meeting promised me and other employees of National that if we signed an authorization card * * * before the election and/or became part of a newly formed group of new employees who supported Local 177 in its efforts to organize the employees of National, we would not have to pay the \$100-\$150 individual initial fee * * *." The affidavit further stated that Benale had renewed his waiver promise at subsequent meetings (A. 31a-31f, S. Pet. App. 7a). Gulino's affidavit stated that Benale had told the employees that "as part of a newly formed group of employees who supported Local 177 in its efforts to organize the [Company's] employees, I would not have to pay" the initiation fee, and that "all those who signed cards before the election would become * * * a member of Local 177 without having to pay the initiation fee" (S. Pet. App. 6a).

2. The Regional Director's administrative investigation of petitioner's objections included interviews with Macaluso and Gulino (S. Pet. App. 6a). In a sworn

⁴Petitioner filed a number of other objections, all of which were rejected by the Board (S. Pet. App. 12a-22a). None of those objections are before this Court.

statement given to a Board agent, Macaluso stated that the earlier statement had been prepared by the Company and was in "error" insofar as it charged that Benale's offer to waive initiation fees had been contingent upon signing an authorization card or supporting the Union in the election. Rather, Macaluso stated that Benale had said that "any employee at National even if laid-off would not have to pay initiation fees" but that "new employees hired after a contract was signed" would be required to pay such fees (S. Pet. App. 6a-7a). He reiterated that Benale had said that "employees of National, being a newly formed group would have initiation fees waived" (S. Pet. App. 7a).⁵ Gulino's affidavit, taken by the Board agent, stated that Benale had said that "once the company was organized and a contract had been signed then all new employees and any new union members would have to pay initiation fees" (*ibid.*). Her sworn statement denied that Benale had ever said that initiation fees would be waived only in exchange for preelection support of the Union; according to Gulino, Benale had "never said anything like that" (*ibid.*). She further explained that the statements attributed to Benale in her first affidavit, prepared by petitioner, referred to "my interpretation of Benale's statements and not his actual statements" (S. Pet. App. 7a-8a).

The Regional Director, pointing out that these clarifications were consistent with Benale's own affidavit and with Board interviews of other employees, dismissed the objection (S. Pet. App. 8a, 12a).

⁵This evidence was consistent with a Union campaign letter submitted by petitioner to the Board in support of its objection. The letter stated, "there is absolutely *no* initiation fee—even if you are now laid-off, as you are still considered part of a newly-formed group" (S. Pet. App. 24a; emphasis supplied).

The Regional Director concluded (S. Pet. App. 11a-12a; footnote omitted):

The waiver * * * made by [the Union] in its leaflet and orally was, and I so find, available to all voters in the election. As the evidence adduced during the investigation disclosed, the waiver herein was not conditioned upon the expression of support for [the Union] in any form during the electoral campaign * * *. [T]he investigation revealed that the [Union] had an established policy of waiving initiation fees for all employees during organizational campaigns regardless of whether they supported the [Union], and so advised employees of the Employer herein. In addition, I find that [the Union's] leaflet is devoid of urgings to employees to sign authorization cards. Based upon the totality of circumstances existing herein, I find that the term "newly formed group," in [the Union's] leaflet and statements could only be interpreted by the employees to include all present employees who joined the [Union] at least up to the time a collective bargaining agreement existed. In this connection, it is clear that the [Union], on a number of occasions, told employees that the waiver would apply until a "contract had been signed." Clearly, in these circumstances, the waiver was made available to all employees, not only before but subsequent to the election, since the [Union] had to be certified as the bargaining representative before a contract could be negotiated and signed.

3. Petitioner then requested Board review of the Regional Director's decision, arguing, *inter alia*, that the Regional Director should have held a hearing to determine whether the Union had made its offer to waive initiation fees contingent upon support for the Union

prior to the election.⁶ To support its request for the hearing, petitioner submitted further affidavits from employees Macaluso and Gulino. Petitioner contended (A. 73) that the discrepancy between the employees' original affidavits and those later given to the Board agent was caused by "the Board Agent or Agents who interviewed the [two employees] * * * hound[ing them] into agreeing with his prejudiced version of the facts." Even in the new affidavits, however, neither employee reiterated the assertions in the original affidavits that Benale had offered the waiver only in exchange for signing authorization cards or supporting the Union prior to the election.

Rather, Gulino's latest affidavit (A. 77-82) stated that the Board agent had asked her if she knew the "meaning of perjury" and "before he began asking questions, had me raise my right hand and swear that I would be telling the truth" (A. 78).⁷ She asserted that Benale had said that "as long as I was part of the group formed to organize at the plant I would be exempt from the initiation fees" (A. 80). Gulino stated that after she signed a representation card she "*thought* that since my name would be on the list of the organized group, I would not have to pay the

⁶Petitioner also urged that the phrase "newly formed group" in the union leaflet created an ambiguity so that employees would believe the waiver was available only to those who signed authorization cards (S. Pet. App. 9a-10a). The Regional Director, distinguishing *Inland Shoe Mfg. Co.*, 211 NLRB 724 (waiver offered to "charter members"), held that "the term 'newly formed group' unlike 'charter member' does not inherently connote a requirement that the employee first join or support [the Union] in order to benefit from the waiver" (S. Pet. App. 12a, 10a-11a).

⁷Normal Board investigatory procedure requires that the affiant be asked to "swear to the truth of what he is saying" and that "[e]ither at the beginning or the ending of the dictated statement, the oath should be formally administered." National Labor Relations Board *Casehandling Manual* Section 10058.2.

initiation fees" (A. 80; emphasis supplied). She added that "what I said in my [first] affidavit is the truth as to the *meaning* of the promise as to waiver of initiation fees, even if I did not quote the language as Mr. Benale spoke it word for word" (A. 81; emphasis supplied).

Macaluso averred that although he was not positive that Benale had used the "exact words" used in Macaluso's original affidavit, "the meaning was the same" (A. 85). He added, "I am absolutely certain that Mr. Benale said that those eligible to vote would not have to pay initiation fees * * *" (A. 86).

The Board denied petitioner's request for review, stating that it raised "no substantial issues warranting review" (A. 88).

4. Thereafter, on charges brought by the Union that petitioner had refused to bargain, the instant unfair labor practice complaint was issued. The Board, on motion for summary judgment, found that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (A. 109).

The court of appeals enforced the Board's order without opinion (Pet. App. i).

ARGUMENT

Petitioner repeats its argument, made to the Board and to the court of appeals, that it was entitled to an evidentiary hearing on its objections to the representation election. Although the National Labor Relations Act does not provide for post-election hearings to resolve challenges or objections to an election, Section 102.69(d) of the Board's Rules and Regulations, 29 C.F.R. 102.69(d), provides for a hearing where an administrative investigation reveals that "substantial and material factual issues exist." Thus, the sole question presented is whether

the Board properly concluded that petitioner's objections raised no "substantial and material factual issues" and could be determined without the necessity of an evidentiary hearing. The Board's resolution of this issue depended upon an evaluation of the particular facts of this case and does not warrant review by this Court.

In any event, the Board acted properly in denying a hearing. In *National Labor Relations Board v. Savair Mfg. Co.*, 414 U.S. 270, 274 n. 4, this Court held that, during an election campaign, a union may offer to waive initiation fees only where such waivers are "available not only to those who have signed up with the union before an election but also to those who join after the election." The issue before the Regional Director, then, was whether the Union had impermissibly conditioned the waiver offer on preelection support for the Union. That determination is properly based, however, on the objective evidence of what the Union said in its written and oral communications to the employees, not on the employees' subjective notion of what the Union meant.⁸ *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 608.

⁸Petitioner's additional contention (Pet. 16-18), that the Union's reference to a "newly formed group" or "charter group" was sufficiently ambiguous so that the two employees' interpretation was reasonably based is without merit. First, there is no evidence that the Union ever used the expression "charter group," since Gulino (who reported it in her first affidavit) later admitted she did not recall what words Benale used (S. Pet. App. 7a-8a). Second, the purported misleading term—"newly formed group"—did not create the ambiguity found by the Board to invalidate elections in *Inland Shoe Mfg. Co.*, 211 NLRB 724, *Coleman Co., Inc.*, 212 NLRB 927, *D.A.B. Industries, Inc.*, 215 NLRB 527, and *Rounsaville of Tampa, Inc.*, 224 NLRB 455, where offers to "charter" or "future members" implied that employees would have to become union members prior to the election in order to avoid payment of initiation fees. Here, to the contrary, it was clear that "newly formed group" meant all those

Petitioner argues that conflicts between the first set of affidavits and the statements to the Board agent by employees Macaluso and Gulino created a dispute over the relevant facts that could only be resolved by a hearing. While the bare allegations of the first set of affidavits secured by petitioner implied that Benale had orally conditioned the waiver on preelection support for the Union, the later statements plainly showed that the employees' first affidavits contained their subjective judgments of what Benale meant rather than a report of his actual statements. In Gulino's words, they represented only their "interpretation of Benale's statements and not his actual statements" (S. Pet. App. 8a). The Regional Director thus properly found that there was no factual conflict as to the actual statements attributable to the Union and properly concluded that the Union's waiver offer "was not conditioned upon the expression of support" during the campaign (S. Pet. App. 11a).

currently having employee status at the Company, particularly in light of the fact that Benale repeatedly stated both in written communications and orally that there would be no initiation fee (S. Pet. App. 24a, 5a, 8a), and that only employees hired after a contract had been reached would be required to pay an initiation fee (S. Pet. App. 7a-8a). See, e.g., *GTE Lenkurt, Inc.*, 215 NLRB 321, where the Board held that even the use of the term "charter member" did not create ambiguity when that term was viewed in the totality of the circumstances, which included clear and repeated expressions of union policy, consistent with *Savair*, throughout the campaign (S. Pet. App. 10a).

Moreover, although 115 employees voted in the election, including 42 against the Union, and although Macaluso and Gulino stated that from 30 to 50 employees attended Union meetings, no other employee had a version of Benale's remarks similar to that alleged by petitioner.

The third set of affidavits, secured by petitioner, did not impeach the Regional Director's original ruling that no factual conflict existed which required a hearing. Both affidavits merely confirmed the conclusion that Gulino and Macaluso, in their original affidavits, were setting forth their interpretations, not Benale's actual statements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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